Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges	)	WC Docket No. 02-361

JOINT COMMENTS OF
THE AMERICAN INTERNET SERVICE PROVIDERS ASSOCIATION
THE CONNECTICUT ISP ASSOCIATION
CORE COMMUNICATIONS, INC.
GRANDE COMMUNICATIONS, INC.
THE NEW MEXICO INTERNET PROFESSIONALS ASSOCIATION
PULVER.COM
US DATANET CORPORATION

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SUMMARY

In its Petition for Declaratory Ruling, AT&T explains that several incumbent local exchange carriers ("ILECS") have recently sought unilaterally to impose interstate access charges on AT&T's "phone-to-phone" internet-protocol based telephony ("IP Telephony") services or to take other measures in an effort to frustrate AT&T's IP Telephony offerings. As a result, AT&T seeks a Commission ruling that IP Telephony services are entitled to subscribe to local services and are exempt from access charges. The Joint Commenters agree. The Commission should unequivocally reiterate the current exemption from access charges for IP Telephony and declare unlawful any ILEC attempts to impose such access charges or to engage in other unilateral self-help measures against IP Telephony providers, until and unless the Commission adopts regulations treating all or some providers of IP Telephony as telecommunications carriers subject to access charges.

Under current and long-standing Commission policy, IP Telephony and other IP-based offerings are not regarded as telecommunications services. The Commission should not alter that policy at this time as IP Telephony is in a nascent and rapidly evolving stage, such that any efforts to regulate such offerings and impose the additional costs that access charges represent would generate the very real prospect of stifling these innovative offerings to the near- and long-term detriment of this nation's public. Certainly the Commission should not make changes to its policies in this declaratory rulemaking proceeding. This is not a rulemaking proceeding, and the Commission has said on repeated occasions over the past two decades that it will not revisit or considering removing the current exemptions from access charges under which IP Telephony falls without the development of a complete and full-blown record in a notice and comment proceeding.

A strong reiteration of current policies by the Commission in this proceeding would help remove uncertainty that current incumbent LEC actions have created and stem a disconcerting trend toward piecemeal and inconsistent regulation that may be developing in the States. The Commission should make clear that, under its exclusive jurisdiction over Internet-based services, it alone has the authority to regulate or refrain from regulating IP Telephony services so as to create a national policy fostering the further development of IP Telephony in all markets in the country under uniform regulatory conditions. Otherwise, the industry is in danger of being subject to a patchwork of regulations as individual states begin to take up this issue, most notably New York and potentially Florida, which just announced it is considering instituting a proceeding regarding the regulatory treatment of IP Telephony providers. In addition, permitting LECs to assess access charges on some or all providers of IP Telephony would interfere with the delicately wrought Access Charge and Universal Service reform measures that the Commission has adopted after much deliberation over the last two years and which are intended to govern access charges in a global sense through 2005.

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The American Internet Service Providers Association ("AISPA"), The Connecticut ISP Association ("CTISPA"), Core Communications, Inc. ("CoreTel"), Grande Communications, Inc. ("Grande"), The New Mexico Internet Professionals Association ("NMIPA"), Pulver.Com, US DataNet Corporation ("US DataNet") (collectively, the "Joint Commenters") hereby comment on the Petition for Declaratory Ruling That AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges ("AT&T Petition") filed by AT&T on October 18, 2002, pursuant to the Commission's Public Notice dated November 18, 2002.[1] As explained herein, in response to the AT&T Petition, the Commission should declare that, consistent with longstanding Commission policy, local exchange carriers ("LECs") may not assess access charges on any form of Internet-protocol-based ("IP") telephony ("IP Telephony")

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1 *Wireline Competition Bureau Seeks Comments on AT&T Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-283, Public Notice, DA 02-3184 (rel. Nov. 18, 2002).

or voice over IP ("VoIP") services until such time as the Commission conducts a rulemaking proceeding and adopts regulations specifically altering the current treatment of IP Telephony offerings. The Commission should also declare any LEC attempts to assess such access charges at this time unlawful.

AISPA is a non-profit association which helps State ISP associations and individual ISPs achieve representation before local and national regulatory and legislative entities. With more than 1600 supporters, primarily in the United States, AISPA brings to bear the full voice of thousands of ISPs and their millions of customers throughout the United States and abroad. The Association promotes the development and expansion of affordable Internet technology to the general public through competitive access options.

CTISPA is a non-profit association of Connecticut-based Internet Service Providers, which represents its members' interests before legislative and regulatory bodies, and promotes the development and use of the Internet and other online services by industry and the general public.

CoreTel is a facilities-based CLEC headquartered in Annapolis, Maryland. Founded in 1997, CoreTel provides a wide variety of telecommunications services and enhanced services to local and regional Internet Service Providers throughout the mid-Atlantic states.

Grande is a facilities-based broadband service provider selling bundled high speed data, local and long distance phone as well as cable television service to residential and small-business customers. Grande is in the process of completing its state-of-the-art fiber-to-the-curb networks serving customers in the seven cities in Texas where it already provides service. An affiliate, Grande Communications Networks, Inc., provides telecommunications services as a carriers' carrier.

Pulver.com, founded in 1994, is engaged in may activities that promote the growth of communications technology, and is a key source of information for those in the IP-based communications industry.

NMIPA is a non-partisan, statewide association of professionals with interests in the Internet and Internet-related activities. The NMIPA acts to foster the growth of the Internet industry and provides Internet education and training in New Mexico. The Association engages in legislative activity germane to the common interests of its members.

US DataNet Corporation is based in Syracuse, New York, and operates under the name USA DataNet. US DataNet provides voice services to members of the public through what is commonly known as and is described herein as IP Telephony.

I. INTRODUCTION

In its Petition, AT&T explains that several incumbent LECs have recently sought unilaterally to impose interstate access charges on AT&T's "phone-to-phone" IP Telephony services or to take other measures in an effort to frustrate AT&T's IP Telephony offerings.[2] As a result, AT&T seeks a Commission ruling that providers of IP Telephony services are entitled to subscribe to local services and are exempt from access charges. The Joint Commenters agree. The Commission should unequivocally reiterate the current exemption from access charges for IP Telephony. The Commission should declare unlawful any LEC attempts to impose such access charges, or to engage in other unilateral self-help measures against IP Telephony providers until and unless the Commission adopts regulations treating all or some providers of IP Telephony as telecommunications carriers subject to access charges.

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2 *See id.* at 4-5.

Under current and long-standing Commission policy, IP Telephony and other IP-based offerings are not regarded as telecommunications services. The Commission should not alter that policy at this time as IP Telephony is still in a nascent and rapidly evolving stage, such that any efforts to regulate such offerings and impose the additional costs that access charges represent would generate the very real prospect of stifling these innovative offerings to the detriment of this nation's public. Certainly the Commission should not make changes to its policies in this declaratory rulemaking proceeding. This docket is not a rulemaking proceeding and is not the appropriate forum to consider such paradigmatic shifts. Indeed, the Commission has said on repeated occasions over the past two decades that it will not revisit or consider removing the current exemptions from access charges under which IP Telephony falls without the development of a complete and full-blown record in a rulemaking proceeding.

A strong reiteration of current policies by the Commission in this proceeding would help remove uncertainty that current incumbent LEC actions have created and stem a disconcerting trend toward piecemeal and inconsistent regulation that appears to be developing in the States. The Commission should make clear that, under its exclusive jurisdiction over Internet-based services, it alone has the authority to regulate or refrain from regulating IP Telephony services so as to further the national policy fostering the further development of IP Telephony in all markets of the country. Otherwise, the industry is in danger of being subject to a patchwork of regulations as individual states begin to take up this issue, most notably New York and potentially Florida, which just announced it is considering institution of a proceeding regarding the regulatory treatment of IP Telephony providers. In addition, permitting LECs to assess access charges on some or all providers of IP Telephony would interfere with delicately wrought Access Charge and Universal Service reform measures that the Commission has

adopted after much deliberation over the last two years and which are intended to govern access charges in a global sense through 2005.

II. THE REGULATION OF IP TELEPHONY AT THIS TIME WOULD FRUSTRATE A SMALL, NASCENT AND RAPIDLY EVOLVING MARKET

IP-based offerings such as IP Telephony hold tremendous promise in today's and tomorrow's markets. As broadband speeds increase and data compression techniques continue to progress, the potential for IP-based services to combine voice, data, video, and other enhanced features in novel and ultimately important ways continually advances. One consequence of this evolution is that efforts to draw lines between types of IP-based service offerings based upon traditionally simple concepts of service categories prove evasive. Such offerings are being rapidly introduced and just as quickly evolve into new forms, but the market for these offerings is still in its early stages and must be given the room to develop if these offerings are to reach their potential and open up avenues for even further innovation.

Providers of IP Telephony services and the equipment associated with them, for example, have developed along several different paths. AT&T's "phone-to-phone" service relies upon AT&T's standing as one of the largest Tier 1 providers of Internet backbone facilities. As such, AT&T uses the Internet backbone to provide limited IP Telephony offerings.[3] AT&T has installed IP gateways that convert switched circuit signals received over local voice lines into IP packet streams, route them over the Internet (much of it, AT&T installed backbone), and then convert the signals back into circuit switched voice signals on the other end at another IP

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3 *See id.* at 17-18.

gateway.[4] Other providers offering phone-to-phone IP Telephony services use a similar arrangement except that instead of using the Internet, they send the IP transmissions between their gateways over self-provisioned or leased non-Internet facilities that are not part of the Internet backbone. While one arrangement uses the common Internet and the other does not, the network architecture is largely indistinguishable in the two cases, especially where the provider is a Tier 1 backbone company like AT&T.

Other IP Telephony calls are between computers that are both connected to the Internet through dial-up or always-on DSL or cable connections. These computer-to-computer connections are made possible through software loaded onto the computers or hardware at the users' premises, such as microphones or other customer devices connected to the computers. In addition, new handsets are being introduced which, in addition to featuring a number of other enhancements to traditional phones, have the capability of converting transmissions to an IP-protocol within the equipment itself, rather than at an IP gateway as in the "phone-to-phone" IP Telephony example discussed above. On any given call using Internet protocols, there may even be a combination of approaches. For example, a call initiated by a computer signed-on to the Internet and enhanced with customer equipment facilitating the voice communication may terminate to a traditional landline phone.

Given that this market is still in its early stages of development and acceptance, it remains premature to project which of the variations of IP Telephony will develop into mature services for which regulation is necessary. It may prove out that every offering on the market today is a prototype at best and that in just a few years time, new variations and enhancements

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4 *Id.*

will appear rendering today's approaches to IP Telephony and other interrelated IP-based services obsolete. Given the rapid pace at which IP Telephony and associated equipment is evolving, that outcome is not unlikely, and any attempt to adopt a definitive or even appropriate regulatory structure now would be doomed to failure, or consign IP-based services to a period of slower growth while they try to claw out from under an inappropriate framework. The Commission has long recognized this potential consequence of regulating Internet-based services, and has been careful to ensure that Internet-based services, including the several forms of IP Telephony, continue to enjoy a period of "unregulation."

The Joint Commenters submit that a departure from the status quo of unregulation, whether in this proceeding or in a new rulemaking proceeding to address Internet-based services, would create regulatory uncertainty and impose unnecessary costs on this fledgling industry segment. Regulatory uncertainty and the imposition of unnecessary costs would slow innovation and deter investment in new and increasingly efficient IP-based network facilities, equipment and technologies. To ensure that uncertainty is minimized, the Commission should rapidly address the issues in the AT&T Petition and grant AT&T the relief it seeks.

The potential for pending Commission proceedings to create industry uncertainty, threatening a nascent market was recognized two decades ago by the Commission in very similar circumstances as those which have prompted the filing of the AT&T Petition and should be instructive to the Commission today. In particular, in 1988, when the Commission was considering the question of whether to remove the exemption against access charges imposed on enhanced service providers (discussed in more detail *infra*), it recognized that "the enhanced

services industry [was] entering a unique period of rapid and substantial change."[5] Because the circumstances facing enhanced service providers made it "an unusually volatile period for the enhanced services industry," the Commission declined to remove the exemption – a decision expressly confirmed in 1998.[6] In addition, the FCC declined to keep the docket open to facilitate addressing the issue later, recognizing that "this approach could add to the substantial uncertainty already confronting the enhanced services industry."[7] The Commission, therefore, closed the docket, noting that were it to address the exemption in the future it would have to do so through a new notice and comment rulemaking.[8]

In the same way, IP Telephony providers currently face a very uncertain and volatile period as the marketplace experiments with a variety of IP-based offerings, some of which may at this time may be stand-alone but all of which increasingly are combined with enhanced, data, or video offerings. The volatility of the larger marketplace in which VoIP competes, as capital investment continues to founder and incumbent LECs rapidly are authorized to enter the long distance marketplace from which they have long been banned, is equally strong today as it was for the enhanced services industry when the ESP exemption was reviewed fourteen years ago. The Commission should act to keep the uncertainty to a minimum by quickly ruling on the AT&T Petition and continuing with its current "hands-off" approach regarding IP-based services until circumstances dictate otherwise. Premature imposition of regulations or charges designed for traditional circuit-switched telephony, or even a lengthy

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5 *Amendment of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 3 FCC Rcd 2631, 2631 (1988) ("ESP Exemption Order").

6 *Id.*

7 *Id.*

8 *Id.*

delay in the disposition of the AT&T Petition, would inhibit the further development of IP Telephony and fly in the face of years of consistent Commission policy.

III. THE FEDERAL POLICY ON INTERNET-BASED SERVICES HAS BEEN TO "WAIT AND SEE" HOW THEY DEVELOP BEFORE IMPOSING REGULATIONS OF ANY TYPE

The Commission has long had a policy of no-regulation for Internet-based services and its forbears. For almost the past two decades it has exempted enhanced service providers and information service providers from interstate access charges. More recently, the Commission explicitly extended the approach of unregulation to IP Telephony in particular, which unregulation had theretofore been implicit and *de facto*, in its 1998 report to Congress on Universal Service. The Commission found that there was no basis to reach a conclusion that any variation of IP Telephony should be subject to Title II regulation as telecommunications services, and deferred further consideration of that question until it had a complete record on which to base a decision in an as-yet-to-be-instituted proceeding. More recently, Chairman Powell and Commissioner Martin have reiterated the Commission's "hands-off" regulatory approach to IP Telephony and other emerging and promising technologies.

A. The ESP Exemption

In 1983, the Commission determined that ESPs, including what are now known as ISPs, would be exempted from interstate access charges as the Commission instituted the access charge regime under which the LECs, in large part, still operate today for purposes of intercarrier compensation with interexchange carriers.[9] Five years later, as explained above, the

[9] *MTS and WATS Market* Structure, 97 FCC 2d 682, 715 (1983).

Commission decided to retain the ESP exemption after compiling a large record to consider whether the ESP exemption should remain in place.[10] The Commission did so because the industry was entering a period of rapid change and volatility, and the agency concluded that the future viability of enhanced services would be burdened by any imposition of access charges.

In 1997, the Commission confirmed the ESP exemption as official Commission policy.[11] Commenting on the soundness of its earlier policies, the Commission found that, *without* the exemption, "the pace of development of the Internet and other services may not have been so rapid."[12] The Commission also noted that the information services industry was still evolving and that the imposition of access charges would frustrate the goals of the 1996 Act "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation.*"[13] Indeed, the emergence of IP Telephony has developed, in large part, out of the hands-off approach by federal and state regulators endorsed by both Congress (in the 1996 Telecommunications Act) and the Commission.

The Commission noted in its 1997 decision that Internet-based services did not use the public switched network in ways analogous to interexchange carriers and that LECs are adequately compensated by enhanced service providers through local access line charges (and if not, the local line charges were a matter to be taken up with State commissions.)[14] The

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10 *ESP Exemption Order, supra.*

11 *Access Charge Reform,* 12 FCC Rcd 15982, 16133 (1997) ("Access Charge Reform Order").

12 *Id.*

13 *Id., quoting* 47 U.S.C. § 230(b)(2) (emphasis added).

14 *Id.* at 16133-34.

Commission also underscored the fact that access charges, even after years of access reform – a deregulatory process which still goes on today – still contained non-cost-based implicit subsidies and other inefficiencies. Indeed, the Commission concluded that even were the access charge system to be "stripped of its current inefficiencies, it may not be the most appropriate pricing structure for Internet access and other information services."[15] In other words, the Commission recognized that the circuit-switched based access reform framework should not be freely transferred to services for which access charges were not initially designed (which would include IP Telephony).

The Commission, while instituting an inquiry proceeding "to consider the implications of information services more broadly," stated, "[w]e intend rather to focus on new approaches to encourage the efficient offering of services based on new network configurations and technologies, resulting in more innovative and dynamic services than exist today."[16] The Commission made clear that any changes to the exemption would be through a subsequent rulemaking.[17]

B. The Commission's 1998 Report to Congress

The following year, in 1998, the Commission issued a report to Congress on Universal Service in which the Commission for the first time engaged in a tentative and preliminary discussion regarding the proper treatment of IP Telephony from a regulatory

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15 *Id.* at 16134.

16 *Id.*

17 *Id.*

perspective.[18] In its discussion, the Commission addressed whether several exemplary forms of IP Telephony were "telecommunications" or "telecommunications services," or whether they fell outside those categories.[19] The AT&T Petition adequately recounts the details of the Commission's analysis of the various VoIP scenarios the Commission used as illustrations, and that will not be restated here.

For purposes of acting on the AT&T Petition, however, the bottom line regarding the *Report to Congress* is that the Commission reached *no* definitive conclusions regarding the regulatory classifications of *any type of IP Telephony*. The Commission, in fact, prefaced its entire discussion with the unequivocal caveat: "We do not believe . . . that it is appropriate to make any definitive pronouncements in the absence of a more complete record focused on individual service offerings."[20] Again, once the Commission engaged in its brief and tentative analysis, it reiterated the exact same statement.[21] It is explained further that

> [b]ecause of the wide range of services that can be provided using packetized voice and innovative CPE, we will need, *before making definitive pronouncements*, to consider whether our tentative definition of phone-to-phone IP telephony accurately distinguishes between phone-to-phone and other forms of IP telephony, and is not likely to be quickly overcome by changes in technology. We defer a more definitive resolution of these issues pending the development of a more fully-developed record because we recognize the need, when dealing with emerging services and technologies in environments as dynamic as today's Internet and

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18 *Federal-State Joint Board on Universal Service,* Report to Congress, 13 FCC Rcd 11501 (1988)("Report to Congress").

19 Specifically, the Commission looked at phone-to-phone IP Telephony where the protocol conversion occurred within IP gateways, and computer-to-computer IP Telephony where the protocol conversion occurred within the users' equipment.

20 *Id.* at 11541.

21 *Id.* at 11544.

> telecommunications markets, to have as complete information and input as possible.[22]

The Commission also noted that, even were it to conclude in some future rulemaking proceeding, in which a full record was developed, that certain forms of IP Telephony were telecommunications services, it did not follow that the providers of those services would pay the same access charges as carriers offering circuit-switched interexchange services. The Commission anticipated that, in that event, it would "face difficult and contested issues related to the assessment of access charges on these providers."[23] Indeed, given the plethora of intercarrier compensation proceedings currently ongoing and recently completed at the Commission, as discussed later in these comments, there is no reason to assume the Commission would inevitably conclude that the same access charge regime should apply to providers of IP Telephony if the Commission were in the future to conclude that the current compensation paid by IP Telephony providers to LECs through local access lines charges and, indirectly, through reciprocal compensation payments were somehow inadequate.

C. The Commission's Policy Continues the "Wait-and-See" Approach

In the past five years, the Commission has not again addressed the ESP exemption or developed the full record described in the *Report to Congress* to address the treatment of providers of IP Telephony. Rather, the Commission has continued to exhibit a "hands off" approach to the development of Internet and IP-based services.

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22 *Id.* (emphasis added).

23 *Id.* at 11545.

This hands-off approach was thoroughly described in 1999 in an Office of Plans and Policy paper entitled "The FCC and the Unregulation of the Internet."[24] The paper demonstrated that the success of the Internet and Internet-related services has been fostered consciously by the Commission through an increasingly deregulatory environment over the past three decades. The paper cautions against imposing legacy regulations on new technologies, such as VoIP, and urges deregulation of traditional services when they begin to be replaced by Internet-based services, rather than regulation of the new services.[25] Regulation, if required, the paper concludes, should be kept to a minimum so as to ensure any benefits from the regulation outweigh the costs and the potential adverse impact on emerging technologies and services.[26]

In early 1999, consistent with the approach advocated in the *Unregulation of the Internet*, the Commission decided not to put on Public Notice a petition for declaratory ruling filed by Qwest (then US West) seeking a ruling that access charges apply to "phone-to-phone" IP Telephony. By not seeking comment on Qwest's petition, the Commission, as a practical matter, affirmed the approach set forth in the *Report to Congress*: the difficult issues surrounding the proper treatment of compensation for carriers carrying IP Telephony traffic required the development of a full record in a rulemaking proceeding before current policies permitting no access charges assessed against VoIP providers can change.[27]

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24 J. OXMAN, *The FCC and the Unregulation of the Internet*, OPP Working Paper No. 31 (July 1999) ("Unregulation of the Internet").

25 *Id.* at 24-25.

26 *Id. at* 25-26.

27 More recently, in the Commission's *Intercarrier Compensation* docket, the Commission deferred for 3 years, until 2004, the application of new Commission rules – yet to be developed – regarding compensation for the exchange of ISP-bound traffic between two LECs. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 – Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151, 9163, 9171 (2001) ("*ISP Remand Order*"). Although that proceeding raises somewhat different

The Chairman and at least one other Commissioner have recently affirmed in speeches the Commission's policy promoting IP Telephony and keeping it free from regulation. Chairman Powell, in October 2002, at the Goldman Sachs Communicopia XI Conference, cautioned that providers of telecommunications would "have to expand beyond the traditional business of selling access to their networks and begin to offer new services."[28] He identified "IP telephony [as one of the] key sources of revenue growth offering consumers a wealth of new benefits in the years to come."

In an earlier speech at the U.S. Chamber of Commerce's Broadband Technology Summit in Washington DC last spring, Chairman Powell recognized the emergence of IP Telephony as one "of the more profound changes happening in our regulated industries."[29] Referring to such development that have the potential to alter the regulatory framework, he stated that "[o]ne should let the flames dance for a while to see how they will change the landscape before jumping to smother them out of fear that they will destroy all that we have built before."[30] This remark echoed his concerns set forth in his concurrence to the *Report to Congress* in which he stated that if all new IP-based services were "all thrown into the bucket of telecommunications carriers" and subject to the same regulations and costs as

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issues related to the use of the Internet by dial-up customers than raised in this proceeding, the Commission's approach in that proceeding underscores the Commission's sound policy in moving deliberately and based on a full record when *considering* the regulation of Internet-based technologies and services.

28 Prepared Remarks of Michael K, Powell, Chairman, FCC, delivered at the Goldman Sachs Communicopia XI Conference, New York, NY, October 2, 2002, at 2.

29 Prepared Remarks of Michael K, Powell, Chairman, FCC, delivered at the U.S Chamber of Commerce, Broadband Technology Summit, Washington, DC, April 30, 2002, at 5.

30 *Id.* at 4.

telecommunications services, the result could "stifle innovation and competition in direct contravention of the Act."[31]

Commissioner Martin, speaking more directly about the Commission's "wait and see" policy towards IP Telephony in a June 2002 Conference on VoIP in Africa explained that:

> At the FCC, we are fearful of intervening prematurely [with respect to new services] in a way that frustrates experimentation and creativity.
>
> We are especially concerned about this in the context of IP telephony. As you know, in the United States, we have not chosen to regulate IP telephony, but are continuing to monitor marketplace developments. We refuse to just assume that it is a new form of an old friend. . . . Indeed, VoIP presents an incredible opportunity for consumers worldwide and we have found that our approach has encouraged its development.[32]

The Chairman and the Commissioner could not have been more clear. IP Telephony represents an innovative and important service that should be given the opportunity to develop, at least for the near term, free of regulation and, most importantly to this proceeding, free of access charges.

IV. THE COMMISSION SHOULD ACT QUICKLY ON THE AT&T PETITION AND REAFFIRM CURRENT FEDERAL POLICY ON IP TELEPHONY

A. The Commission Should Quiet Any Existing Regulatory Uncertainty and Provide Clear Guidance to the States

As a nascent industry sector, IP Telephony suffers from uncertainty, especially in these difficult times for the telecommunications industry. The AT&T Petition presents the Commission with a golden opportunity to remove any uncertainty that may be created by recent incumbent LEC attempts to impose access charges on any form of IP Telephony. The

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31 *Report to Congress,* 14 FCC Rcd at 11623 (Powell, Com'r, concurring).

32 Welcoming Remarks by Com'r Kevin J. Martin, FCC, to the African VoIP Conference, Supercomm 2002, Atlanta, GA, June 5, 2002, at 2.

Commission should seize this opportunity, not only to direct the incumbent LECs involved to cease such unlawful self-help measures, but also to eliminate the potential for a patchwork of State commission decisions in the absence of clear federal guidance.

Indeed, the Commission should explicitly find that the regulatory treatment of IP Telephony is within its exclusive jurisdiction and thus subject to federal preemption. The reasons for this are largely the same as drove the Commission to find that it has exclusive jurisdiction over ISP-bound dial-up calls in its *Intercarrier Compensation proceedings.*[33] Furthermore, not only does IP Telephony frequently make use of the Internet, but in numerous instances these services are configured in such a way that the endpoints of the communication, whether local or interstate, are not readily discernible, as the AT&T Petition makes clear[34] and the Commission noted in the *Report to Congress.*[35] Under these circumstances, the Commission should preempt the entire field in order to ensure that national policies regarding interstate IP Telephony traffic are not frustrated by a patchwork of conflicting State decisions that could have the effect of undermining continued growth and innovation in IP Telephony services across the country.

The concern about piecemeal State regulation is real and the resulting harm that it would cause may be imminent. As the AT&T Petition noted, earlier this year, the New York PSC found that at least one type of IP Telephony was telecommunications services and that

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33 *See, e.g., ISP Remand Order, supra.*

34 AT&T Petition at 31.

35 13 FCC Rcd at 11545 ("it may be difficult for the LECs to determine whether particular phone-to-phone IP telephony calls are interstate . . . or intrastate.").

access charges could be assessed by LECs against the provider of that service.[36] In the current context, there are three things that are most significant about the PSC's order. First, the PSC relied very heavily on its own interpretation of this Commission's statements and policy on IP Telephony, which have been discussed above. In fact, over 75% of the PSC's four-page discussion reviewed the Commission's statements on the subject, such that the PSC's read of tentative federal policy forms the principal basis for the decision. As noted above, the Commission made clear in its *Report to Congress* it did not have the full rulemaking record required to make any definitive pronouncements on the issue. The NY PSC, however, while noting the centrality of the Commission's preliminary analysis of IP Telephony, especially in the *Report*, to guide its own determinations, proceeded to reach a decision as best it could *without specific federal guidance.* This is the second point, then: the States are being put in situations where they must act and they will not have the luxury to wait for the Commission's lead if it is not available. Third, the NY PSC decision is contrary to the only other State decision to date on the issue of which the Joint Commenters are aware, in which the Colorado PUC determined that access charges did not apply to IP Telephony.[37] In short, there is already a "split" among the states after two decisions, signaling the need for central federal guidance.[38]

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36 *See* Order Requiring Payment of Intrastate Carrier Access Charges, Case 01-C-1119, May 31, 2002.

37 *Petition by ICG Telecom Group, Inc., for Arbitration of an Interconnection Agreement with U S West Communications, Inc.*, Decision No. C00-858, (Aug. 1, 2000) at 6-10.

38 Significantly, the PSC did not order the IP Telephony provider in the New York case to pay a particular level of access charges but left it to the parties to determine the right level, and presumably the right structure, of the compensation. This underscores the point that even were access charge compensation to apply to IP Telephony, the framework that compensation would take may not be a simple application of existing access charge rules.

The urgency of the Commission acting now and with preemptive authority is underscored by the Florida PSC's treatment of the issue. As the AT&T Petition notes, the PSC late last year deferred the question of access charges applied to IP Telephony to future proceedings, in significant part because the Commission yet had no rules.[39] However, after another year of no action by the Commission, the Florida PSC, just yesterday at its monthly Agenda Conference, considered opening of a generic docket to examine whether certain types of IP Telephony should be subject to access charges and regulation heretofore reserved for traditional providers of telecommunications services.[40] A final decision on whether to open this generic docket is expected soon from the Florida PSC.

Although there is not yet a flood of State decisions on this matter, it is clear that the States will not wait indefinitely for the Commission to act. The Commission should use the opportunity created by the AT&T Petition and quickly quiet uncertainty regarding the application of access charges to providers of IP Telephony. Specifically, the Commission should reaffirm the hands-off policies that have guided it for the past two decades and find the incumbent LECs' self-help measures unlawful. The Commission should also assert preemptive authority over the States in this area to ensure a uniform approach to this issue nationally to preserve the environment it has created that has promoted the development of IP Telephony and other IP-based services and related investment over the past twenty years.

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39 *Investigation into Appropriate Methods to Compensate carriers for Exchange of Traffic Subject to Section 251 of the Telecommunications Act of 1996*, No. 000075-TO (Nov 21, 2001).

40 *See* Regular Agenda Conference, Florida Public Services Commission, Docket No. 02-1061-TP (Dec. 17, 2002).

B. Any ILEC Attempt to Employ Self Help Measures to Force VoIP Companies to Pay Access Charges Must Be Prohibited

Certain ILECs are now attempting to subvert the Commission's policies on Internet-based services by engaging in self-help based on their position that business lines and other local facilities are available only for "computer-to-phone" and "computer-to-computer" IP Telephony services, but not for "phone-to-phone" IP Telephony services. As AT&T explains in its Petition, these ILECs are: "(1) refusing properly to provision local business lines to terminate phone-to-phone IP telephony services, (2) taking down local business lines that they discovered are being used to terminate such calls, or (3) using Calling Party Number identifiers to assess interstate (and intrastate) access charges on phone-to-phone telephony calls that terminate over reciprocal compensation trunks."[41]

Any ILEC attempt to employ self help measures such as these to force IP Telephony providers to pay access charges is illegal and must be prohibited. The Commission has held that "there are three ways in which a carrier seeking to impose charges on another carrier can establish a duty to pay such charges: pursuant to (1) Commission rules; (2) tariff; or (3) contract."[42] Accordingly, a carrier cannot unilaterally demand access charges from another carrier unless it can identify a specific Commission rule, tariff, or contract that unequivocally requires the other carrier to pay access charges.

There is no Commission rule that enables carriers to impose access charges for IP Telephony. As explained in detail above and in AT&T's Petition, the Commission has held that

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41 AT&T Petition at 4-5; *see also id.* at 19-21 (providing specific examples of ILEC self-help attempts).

42 *Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, 17 FCC Rcd 13192, 13196 (2002).

all of the emerging IP Telephony services should remain exempt from regulation and access charges until the industry matures and the Commission compiles a full record on the issue and determines whether some form of access charges can, and if so should, be applied to any of the forms of IP telephony. Accordingly, the Commission's rules do not enable carriers unilaterally to impose legacy access charges on IP Telephony traffic.

Likewise, none of the access tariffs enable carriers to impose access charges for IP Telephony traffic. IP telephony can take many different forms and can be provided using many different network configurations. Consequently, it should come as no surprise that current access tariffs designed to apply to traditional interexchange circuit-switched voice services contain charges for network elements that typically are not used by providers of IP telephony. Were these same access charges assessed on VoIP providers, because they contain rates for Feature Groups A, B, C and D, VoIP providers would be "reimbursing" LECs for costs that are not associated with IP Telephony or imposed by VoIP providers. This would be particularly egregious since the Commission's current and long standing policy has been to exempt all forms of IP Telephony from access charges.

The inapplicability of access tariffs to IP Telephony becomes increasingly apparent when specific network configurations are examined. Consider, for example, IP Telephony provided over a dial-up Internet connection to a customer who obtains local telephone service from the ILEC. After reaching the IP Telephony provider's server by dialing a seven-digit number, the caller indicates the telephone number to which the caller wishes to be connected via the IP Telephony provider's service, and the IP Telephony provider connects the caller to that number using VoIP technology. As the Commission has suggested, the technical configuration for establishing dial-up Internet connections may be most similar to Feature Group

A ("FGA") access, pursuant to which the caller first dials a seven-digit number supplied by the ILEC to reach the IXC over lines provided solely by the ILEC, and then dials a password and the called party's area code and number to complete the call over the IXC's network.[43] Unlike FGA access, however, the telephone number and the switching required to complete the connection for an IP Telephony service are provided by the IP Telephony provider's local exchange carrier, typically itself or a CLEC, not the ILEC. Consequently, the rate for FGA access would contain charges for network elements and services that the IP Telephony provider does not take from the ILEC to provide IP Telephony services, whereas the IXC in the example above *does* take its service from the ILEC assessing the FGA charges. Under circumstances where an IP Telephony provider takes its "line-side" access line from itself or a CLEC, requiring the IP Telephony provider to pay the ILEC for FGA access would be inappropriate and unjust, and would lead to a windfall for the ILEC, who already is paid by its own customer for originating the call. A similar situation occurs on the terminating end where the IP Telephony provider obtains local access through a line-side connection from a LEC other than the LEC seeking to impose terminating access charges. The same concerns of inapplicability arise when callers use a broadband connection to reach an IP Telephony provider, as well as for most other variations of IP Telephony, whether computer-to-computer, computer-to-phone, or phone-to-phone.

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[43] *ISP Remand Order*, 16 FCC Rcd at 9179 (2001). Notwithstanding the dialing sequence for FGA, the service the LEC provides is considered interstate access service, not a separate local call. *See Local Competition Order*, 11 FCC Rcd at 15935 n.2091 (describing "Feature Group A" access service); *see also MCI Telecomm. Corp. v. FCC*, 566 F.2d 365, 367 n.3 (D.C.Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978). Therefore, assuming arguendo that access charges could be imposed on VoIP traffic pursuant to a tariff, the charges would have to be imposed pursuant to a federal interstate access tariff.

Therefore, none of the current access tariffs enable carriers unilaterally to impose access charges on IP Telephony traffic.[44]

Finally, although the Joint Commenters are unaware of any contracts pursuant to which carriers can impose access charges for IP Telephony, AT&T's Petition does not address voluntary agreements concerning the appropriate compensation for VoIP traffic. Rather, AT&T's petition, like these comments, focuses on attempts by carriers unilaterally to impose access charges on IP Telephony traffic. Therefore, the Commission need not address voluntary contractual arrangements regarding IP Telephony traffic at this time.

In sum, a carrier can unilaterally impose access charges on another carrier only if it can establish a duty to pay such charges pursuant to the Commission rules, a tariff or a contract. There are no Commission rules or federal interstate access tariffs that enable carriers unilaterally to impose access charges on IP Telephony traffic. Therefore, any attempt by a carrier unilaterally to impose access charges on IP Telephony traffic, absent willing consent from the IP Telephony provider, is illegal and must be prohibited.

V. IMPOSITION OF ACCESS CHARGES ON IP TELEPHONY – WHETHER RESULTING FROM ILEC SELF-HELP OR STATE MANDATE – WOULD UNDERMINE THE FCC's ACCESS CHARGE AND UNIVERSAL SERVICE REFORMS

During the past few years, the Commission has initiated a series of interrelated proceedings to examine its rules governing compensation between ILECs, CLECs and IXCs and has adopted interim rules in an attempt to establish economically rational rates. Through these

[44] Indeed, even if the Commission concluded that certain forms of VoIP traffic should be subject to access charges pursuant to a federal interstate access tariff – and it should not – it would be virtually impossible to distinguish VoIP traffic from other types of Internet-based traffic not subject to access charges (not to mention virtually impossible to distinguish certain types of VoIP from each other).

proceedings, the Commission hopes to create the conditions that will eventually enable the Commission to deregulate the telecommunications industry. In recognition that "access charge and universal service reform presents a series of controversial and interrelated issues without a single, precise solution," the Commission has established interim rates, many of which are based upon carefully balanced compromises between interested parties, that the Commission will reexamine in 2005. These interim rules were based in part upon the assumption that access charges will not be imposed on IP Telephony. As such, the unilateral imposition of above-cost access rates by ILECs for IP Telephony traffic would destroy the balance upon which these compromises have been based and interfere with the Commission's reform efforts by reintroducing implicit subsidies into access charges that the Commission is attempting to eliminate, as explained below. Therefore, the Commission should not permit carriers or states to impose above-cost access rates on IP Telephony traffic.

A. In Recent Years, the FCC has Adopted Four Major Orders that Establish Interim Rules Governing All Forms of Compensation Between ILECs, CLECs and IXCs

In recent years, the Commission has examined access rates through several proceedings in an attempt to make them more economically rational and to establish a "pro-competitive deregulatory national policy framework" for the United States' telecommunications industry.[45] Some of the Commission's overarching goals in this effort include the promotion of competition, the alignment of access rate structures more closely with the manner in which costs

[45] *See, e.g., Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, 16 FCC Rcd 9923, ¶ 1 (2001) ("CLEC Access Charge Order").

are incurred, the removal of universal service subsidies from access rates and the deregulation of the telecommunications marketplace as competition develops.[46]

The Commission has repeatedly explained that inefficiencies in the structure and level of access rates, which artificially inflate long distance per-minute rates, suppress demand for interstate long distance services and create implicit subsidies from high-volume to low-volume users of interstate long distance services.[47] The Commission has concluded that "[i]mplicit subsidies have a disruptive effect on competition in the market for local exchange and exchange access services."[48]

As part of its efforts to remove implicit subsidies from access charges and to ensure that the rates for access charges and reciprocal compensation are economically rational, the Commission has adopted interim rates in a series of four major orders. These orders are part of a single package intended to establish certainty in the marketplace for the next three years. The result of the Commission's efforts has been a steady reduction in access charges and in long distance rates which, in turn, has dramatically increased consumer usage of long distance service.[49]

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46 *Id.*, at 9926.

47 *See Access Charge Reform Order,* 12 FCC Rcd at 15986, 15995-96, 16013.

48 *Multi-Association Group (MAG) Plan for Regulation of Interstate Service of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, Federal-State Joint Board on Universal Service, Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulation, Prescribing the Authorized Rate of Return for Interstate Service of Local Exchange Carriers*, 16 FCC Rcd 19613, 19623 (2001) ("MAG Order").

49 *CLEC Access Charge Order*, 16 FCC Rcd at 9926.

1. The CALLS Order established interim access charges for large ILECs until 2005.

The *CALLS Order* is a carefully balanced five-year transition plan for reforming the federal access charge and universal service systems.[50] The *CALLS Order* resolved major outstanding issues concerning access charges of price-cap ILECs globally by determining the appropriate level of interstate access charges and by converting implicit subsidies in interstate access charges into explicit, portable, and sufficient universal service support.[51] Specifically, the Commission established a new interstate access support mechanism, capped at $650 million annually, to replace implicit support in the interstate access charges of price cap carriers.[52] The Commission found $650 million to be a reasonable amount that would provide sufficient, but not excessive, support.[53] The Commission intended the *CALLS Order* to be an *integrated* interstate access reform and universal service plan.

The Commission believed that its adoption of the *CALLS Order* moved the Commission a step closer to its access charge reform goals for dominant carriers. The Commission intended the *CALLS Order* to bring lower rates and less confusion to consumers and to create a more rational interstate rate structure, which in turn was supposed to support more efficient competition, more certainty for the industry and permit more rational investment decisions. The *CALLS Order* is interim in nature, covering a five-year period ending in July

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50 *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Low-Volume Long-Distance Users, Federal-State Joint Board on Universal Service*, 15 FCC Rcd 12962 (2000) ("CALLS Order"), *aff'd in part, rev'd in part, and remanded in part, Texas Office of Public Util. Counsel et al. v. FCC*, 265 F.3d 313 (5th Cir. 2001), *cert. denied, Nat'l Ass'n of State Util. Consumer Advocates v. FCC*, 70 U.S.L.W. 3444 (U.S. Apr. 15, 2002) ("CALLS Decision").

51 *CALLS Order*, 15 FCC Rcd at 12974-76.

52 *See MAG Order*, 16 FCC Rcd at 19627.

53 *Id.*

2005.[54] At that time, the Commission will reexamine its reforms and adopt any further reforms necessary to remove remaining implicit subsidies in access charges.

2. The MAG Order established interim access charges for small ILECs through 2005.

Building upon the reforms of the *CALLS Order*, the Commission adopted the *MAG Order* to reform the interstate access charge and universal service support system for ILECs subject to rate-of-return regulation (non-price cap or rate-of-return carriers).[55] Specifically, the *MAG Order* aligns "the interstate access rate structure more closely with manner in which costs are incurred, and create a universal service support mechanism to replace implicit support in the interstate access charges with explicit support that is portable to all eligible telecommunications carriers."[56] The Commission intended these actions to foster competition and efficient pricing in the market for interstate access service, and to create universal service mechanisms that will be secure in an increasingly competitive environment.[57] The *MAG order* largely completed the interstate access charge and universal service support reforms the Commission initiated following the passage of the 1996 Act.

In adopting the *MAG Order*, the Commission concluded "that leaving the removal of implicit support to the discretion of individual carriers is neither consistent with the mandate of the 1996 Act nor justified from a public policy standpoint."[58] Accordingly, the Commission designed the reforms of the *MAG Order* to carryout the universal service policies embodied in

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54 *CALLS Order*, 15 FCC Rcd at 12977.

55 See *MAG Order*, 16 FCC Rcd at 19613.

56 *Id.* at 19617.

57 *Id.*

58 *Id.* at 19619.

the 1996 Act and to establish a "pro-competitive, deregulatory national policy framework" for the United States telecommunications industry. The *MAG Order* is not intended to be a permanent solution, and the Commission will review the *MAG Order* as the terms of the CALLS plan and the Rural Task Force Plan near their respective ends.[59]

3. The CLEC Access Charge Order established interim access charges for CLECs until 2005.

In April of 2001, the Commission revised its tariff rules more closely to align tariffed CLEC access rates with those of the incumbent LECs in the *CLEC Access Charge Order*. Under these rules, CLEC access rates that are at or below the Commission's benchmark are presumed to be reasonable and CLECs may impose them by tariff. Above the benchmark, CLEC access charges are mandatorily detariffed, so the CLECs must negotiate higher rates with the IXCs if it seeks to charge them. The Commission implemented the benchmark in a way that will cause CLEC rates to decline over time until they reach the rate charged by the incumbent LEC. This mechanism is a transitional one, and it is not designed as a permanent solution to the issues surrounding CLEC access charges. The Commission views the mechanism as a "means of moving the marketplace for access services closer to a competitive model."[60] Because the tariff benchmark is tied to the incumbent LEC rate, the Commission will re-examine these rates at the close of the period specified in the *CALLS Order*.[61]

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59 *Id.* at 19620.

60 *CLEC Access Charge Order*, 16 FCC Rcd at 9925-26.

61 *Id.*

4. The ISP Remand Order prescribed intercarrier compensation for local traffic at least through 2004.

Responding to ILEC complaints regarding the alleged lopsidedness of reciprocal compensation payments to CLECs, the Commission addressed and modified the arrangements for intercarrier compensation for ISP-bound traffic in two recent interrelated proceedings. The Commission initiated these proceedings in part to address the alleged mismatch of the reciprocal compensation regime with the one-way traffic flow of ISP-bound traffic.

In the *ISP Remand Order,*[62] the Commission adopted an interim compensation scheme to apply to ISP-bound traffic exchanged between ILECs and other LECs. The Commission concluded that, on an end-to-end basis, ISP traffic, including the local dial-up portion of an ISP service, is part of an interstate service. Therefore, the Commission asserted that it retains jurisdiction under Section 201 of the Act[63] to establish the rules governing the compensation for such traffic.[64] Much of IP Telephony ostensibly falls within the scope of this interim compensation scheme, and it would be difficult to distinguish this traffic from the types of IP Telephony traffic that might not fall within the interim compensation scheme.

In the *ISP Remand Order*, the Commission concluded that instead of a reciprocal compensation regime, which it viewed as full of distortions when applied in the context of ISP traffic, a bill and keep compensation regime should be imposed on an interim basis. Rather than requiring a "flash cut" to such a regime, however, the Commission instituted an interim cost recovery regime based on lowered compensation rates and a 36-month transition toward a

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62 *ISP Remand Order, supra*, 16 FCC Rcd 1951, *reversed in part on other grounds sub nom. WorldCom, Inc. v. FCC*, 288 F. 3d 429 (DC Cir. 2002).

63 47 U.S.C. § 201.

64 *ISP Remand Order*, 16 FCC Rcd at 9175.

complete bill and keep regime until intercarrier compensation rules could be developed. In its companion notice of proposed rulemaking proceeding, the *Intercarrier Compensation NPRM*, the Commission has formally proposed a bill and keep arrangement for ISP-bound traffic.[65]

The Commission's actions with respect to ISP-bound traffic must be read in conjunction with the Commission's actions in the *CALLS Order*, the *MAG Order* and the *CLEC Access Charge Order*. The inclusion of ISP-bound traffic, let alone *all* IP Telephony, into the pool of traffic subject to access charges would distort and ultimately upset the balance the Commission sought to create in the interstate access charges framework through 2005 as it moves to rates more closely aligned with direct economic costs. The Commission has not only established interim rates for ISP-bound traffic, but also insulated this traffic from the unilateral imposition of access charges by carriers. The Commission similarly should reaffirm that all types of VoIP Telephony are insulated from the unilateral imposition of access charges by carriers.

B. These Orders Are Based on the Assumption that VoIP Telephony Is Exempt from Access Charges

In the *CALLS Order*, the Commission sought to identify the universe of access charges, reduce access charges based on those findings, and replace implicit Universal Service subsidies with explicit funding mechanisms. The Commission adopted the subsequent *MAG Order*, the *CLEC Access Charge Order* and the *ISP Remand Order* with the findings it made in the *CALLS Order* firmly in mind. All four of these orders are intended to be part of an integrated effort to reform the regulations governing compensation between ILECs, CLECs and IXCs so as to ensure that the resulting rates move more closely to economically rational cost-based rates.

65 *See id.* at 9181-82.

In adopting these orders, the Commission considered the effect that ISP-bound traffic, including IP Telephony, would have on the access charge, universal service and reciprocal compensation regimes. The Commission based its conclusions in part on the assumption that ISP-bound traffic, including IP Telephony, is not subject to access charges. For example, when the Commission adopted the *CALLS Order*, Commissioner Harold Furchtgott-Roth explained that

> the current structure of interstate access charges is irrational, and substantial revision of the Commission's access charge rules is needed. At present, the price of access to the local exchange carriers' networks bears very little relation to the way in which the costs of access are actually incurred – per-minute charges for access are far higher than they should be, whereas fixed charges are artificially low. *As substitutes for traditional circuit-switched long-distance services, such as packet-switched Internet-based telephony, become more widely available, the regulatory distortions created by the Commission's rules are increasingly untenable.*[66]

Commissioner Furchtgott-Roth's statement reflects the assumption by the Commission that packet-switched IP Telephony would remain free from access charges, and that this regime of charges should not be extended to these new IP Telephony services. This stance is consistent with the Commission's long-standing policy that all forms of Internet-based services, including IP Telephony, are not subject to access charges, and that the application of access charges in whatever form to IP-based services is not a given and could not occur until a full record on the issue is developed.

Based on the Commission's current policy with respect to Internet-based services, the Commission assumed that there would be *no* access charges from IP Telephony when it

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66 *CALLS Order*, Statement of Commissioner Harold Furchtgott-Roth, Concurring in Part and Dissenting in Part, 15 FCC Rcd at 13149 (emphasis added).

chose access charge reduction levels and created the explicit Universal Service funding mechanisms in the *CALLS Order*. The *MAG Order*, the *CLEC Access Charge Order* and the *ISP Remand Order* similarly reflect the Commission's assumption that VoIP traffic is not subject to access charges.

C. Imposition of Access Charges on VoIP Would Undermine the Balance Sought by these Orders by Illegally Creating New Sources of Increased Access Charges and Universal Service Revenues

The imposition of above-cost access charges[67] on IP Telephony traffic – whether resulting from unilateral carrier actions or state PUC decisions – would undermine and unravel the Commission's efforts to reform the access charge, universal service and reciprocal compensation regimes. These reforms are based on the Commission's recognition that above-cost access charges containing implicit subsidies have not been collected and will not be collected for any form of IP Telephony. Indeed, the Commission cited the potential threat that IP Telephony could pose the Universal Service Regime unless implicit subsidies were not removed from access charges applied to traditional circuit-switched interexchange services and replaced with explicit funding mechanisms since IP Telephony is not subject to access charges.[68]

Reversal of the Commission's assumption that all Internet-based traffic is exempt from access charges would effectively reverse the Commission's hard-fought decisions on the "controversial and interrelated issues" raised by access charge and universal service reform by reintroducing implicit subsidies into access charges at the same time that the Commission is

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67 *See, e.g., Competitive Telecommunications Association v. FCC*, 309 F. 3d 8 (DC Cir. 2002) (finding that access charges still contain implicit subsidies).

68 *CALLS Order*, Statement of Commissioner Harold Furchtgott-Roth, Concurring in Part and Dissenting in Part, 15 FCC Rcd at 13149 (emphasis added).

trying to phase them out. A reversal would also destroy the "consensus represented by the CALLS plan," which the Commission credits with helping it to "select, from among various legitimate possible approaches, one that achieved its competitive and universal service goals in a manner that is reasonable and in the public interest."[69]

The increase in implicit subsidies that would result if above-cost access charges are imposed on IP Telephony would lead the Commission away from the rational interstate rate structure it seeks to establish, and interfere with the other measures that the Commission adopted to support more efficient competition. It would also create new and potentially more controversial issues that the Commission would have to address in future rulemaking proceedings. For example, the Commission have to determine how carriers can distinguish IP telephony traffic that would be subject to access charges from other Internet traffic, which presumably be subject to bill-and-keep in light of the Commission's *ISP Remand Order*.

Equally damaging would be the uncertainty that a Commission decision to impose access charges on IP Telephony would cause. As the Commission has recognized, the uncertainty of litigation creates substantial financial uncertainty for parties on both sides of the dispute, which "poses a significant threat to the continued development of local-service competition, and . . . may dampen CLEC innovation and the development of new product offerings."[70] Therefore, the Commission should not permit carriers or States to impose above-cost access rates on VoIP traffic.

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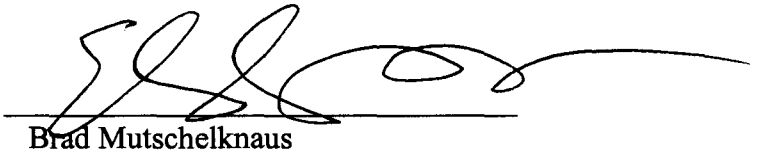
69 *MAG Order*, 16 FCC Rcd at 19618.

70 *CLEC Access Charge Order*, 16 FCC Rcd at 9932.

VI. CONCLUSION

For the foregoing reasons, the Commission should reiterate its decades-old policy of exempting Internet- and IP-based services from access charges. The Commission should in no uncertain terms prohibit the use of self-help as a means of imposing access charges unilaterally on IP Telephony services.

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

I, Christina R. Ballantine , a legal secretary at Kelley Drye & Warren LLP, do hereby certify that on this 18th day of December, 2002, unless otherwise noted, a copy of the foregoing "JOINT COMMENTS," was sent by the means indicated to each of the following:

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